

## Field Sobriety Tests

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## FST Demonstrations

- Demonstrative Evidence
  - Admissible if relevant & aids jury "in understanding and determining the facts."  
*Slow Development Co. v. Coulter*, 88 Ariz. 122, 129 (1960).
  - *Bledsoe v. Salt River Valley Water Users' Association*, 179 Ariz. 469 (App. 1994).

## FIELD SOBRIETY TESTS

- Horizontal Gaze Nystagmus
- Walk & Turn
- One Leg Stand
- Rhomberg-Modified
- Finger to Nose
- Finger Count
- Hand Trace
- Alphabet



## Generally They Are All Standardized Tests

- Administered in the same manner
- Always graded the same way



## Divided Attention Task

A task which requires the subject to concentrate on both mental and physical tasks

[illegible]

### Don't Forget "Non-cue" Evidence

- Does not watch feet at all times
  - Incriminating statements
  - Slurred speech
  - Incorrect counting
  - Starts before told to (OLS)
  - Does not look at foot
  - Does not point toe
- Not dividing as much attention - easier

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### Horizontal Gaze Nystagmus

An involuntary jerking of the eyes  
as they gaze toward the side

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### Additional HGN Evidence

- Unable to keep head still
  - Very common with higher readings
- Noticeable sway

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## Vertical Gaze Nystagmus (VGN)

- Involuntary jerking of the eyes in the vertical
- The eyes move up and & held for at least 4 seconds
- If observed, indicates high dose of alcohol for that person (or certain drugs)

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## Trial Tips



- **Always** ask officer before having him/her demonstrate FSTs
- Listen to your witness
- May want use experienced officer or criminalist to bolster FSTs/HGN testimony
- Other DUI evidence supports FSTs

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## More Trial Tips



- Interview and work with your officer
  - Pass/fail
  - VGN
  - Resting nystagmus
  - 4-6 cues = .08
  - Specific issues – shoes, contacts, glasses, weight
  - Familiarity with studies

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## What if the Defendant "Passes" an FST?

- Don't hide the fact
- Point out any present cues (they are still signs and symptoms of impairment)
- Emphasize other symptoms of impairment present
- Remember, a DUI investigation is the totality of the circumstances

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## Tolerance

- Practiced drinkers – will see less physical signs
- Use experts – defense & state
- All impaired at .08 no matter how tolerant
- MOST impaired at .05 (Stoltman)
- HGN

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## What If There Are No FSTs

- **Defendant refused** = consciousness of guilt
- **FSTs not given** - bring out why
  - Officer Safety
  - Safety of the Defendant
  - Bad location
  - Language barrier
- Emphasize other evidence

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## Field Sobriety Tests

- May comment on refusal to take
- 5th Amendment does not apply
- 4th Amendment does not prevent comment
- Probable cause not required

*State v. Theriault*, 144 Ariz. 166 (App. 1984); *State v. Superior Court* (*Spears*, RPI), 154 Ariz. 275 (App. 1987).

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## The Studies What Do They Really Do & Say?




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## Validated as Opposed to Not Valid

- SFSTs validated for predicting at or above certain BAC
- The validation (standardized) relates to BAC

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## Validated as Opposed to Not Valid

- FSTs are also good for demonstrating impairment
  - training & experience
  - observations
  - studied & manuals
  - common sense

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## Validated As Opposed to Not Valid

- Studies found numerous FSTs are sensitive to alcohol
- Merely determined the best set
- Others are Not invalid
- FSTs existed long before the validation studies

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## SFST Validation Studies

- Mostly relate to HGN in Arizona
  - Validation is for above .08/.10
  - *Albrect* – cannot use this way in AZ for W&T and OLS, etc.
- NOT a basis to suppress W&T or OLS (>65; overweight, etc.)
  - *Albrect*
  - Rule 702 does not apply - *Blake*

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## VGN

- **Manual** – not in original research but field use has proven VGN reliable indicator of high dose Etoh & DID drugs for that individual
- **Studies** - Citek 2003 & 2011
- No AZ case says does not meet Rule 702 or is not admissible

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## HGN Testimony - with a blood/breath test

- May testify
  - based on training & experience, 4 or more clues on HGN = BAC of .08 or more
  - may testify how accuracy rating is determined



*State v. Superior Court (Blake, RPI) -1986; State ex rel. McDougal v. Ricke -1989*

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## HGN Testimony – without a breath/blood test

- **May not testify**
  - based on training and experience, 4 or more clues on HGN = BAC of .08 or more
  - how accuracy rating is determined
- **May testify**
  - “neurological impairment one cause of which might be alcohol impairment”
  - each clue is a sign or symptom of impairment
  - HGN is the most accurate of the FSTs

• *State ex rel. Hamilton v. City Court (Lopresti, RPI) -1990*

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## HGN

- Sway is a sign or symptom
- Inability to follow stimulus strong symptom of impairment
- Inability to keep head still = strong symptom

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## HGN

- Bring out officer checked
  - Equal tracking
  - Equal pupil size
  - Resting nystagmus (pre-try)
  - Conditions were appropriate

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## FST Testimony

- Not Limited to "Signs and Symptoms"
  - May testify re: purpose "an attempt to determine if intoxicated"
  - May use word "pass", "fail", and "test"
- May Not quantify BAC with general FSTs

*State v. Askren*, 147 Ariz. 436 (App. 1985); *State v. Campoy* (Cordova, RPI), 214 Ariz. 132, (App. 2007); *Fuenning v. Superior Court*, 139 Ariz. 590 (1983); *State ex rel. v. McDougall v. Albrecht* (Williams, RPI), 168 Ariz. 128 (App. 1991).

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## Rule 702/Daubert

- Should Not Apply to General FSTs
  - *State v. Superior Court (Blake, RPI)*, 149 Ariz. 269 (1986); *State ex rel. McDougall v. Ricke*, 161 Ariz. 462 (App. 1989); *State ex rel. Hamilton v. City Court (Lopresti, RPI)*, 165 Ariz. 514 (1990).
- Will Apply to HGN
  - Emphasize officer's training/experience
  - Can get studies in through other means
  - TSRP has materials

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## Studies That Respond To Common Plays

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## 2007 HGN Robustness Study

- Variations in stimulus speed
  - Optimal speed center to side = 2 seconds
  - Slower no effect
  - Faster = false negative errors
- Manuals also recognize
  - Prior 45 degrees - Use full 4 seconds (full pass) if move too fast may go past point of onset or miss it.

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## Robustness - 2007

### ■ Eye elevation

- 1st test period = no significant differences
- 2<sup>nd</sup> = errors only resulted in false negatives
  - 2 inches above eye = most negative
- Raising eye 4 inches does not engage different eye muscles

### ■ Distance of stimulus to face

- Increased distance = did not alter results
- Decreased distance = increased accuracy

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## Robustness - 2007

### ■ Variations in subject's prostitution

- Standing, sitting & lying down = no significant differences
- Citek found same

### ■ Subjects with vision in only one eye

- HGN is reduced in a non-functioning eye
- Increased false negatives
- No evidence leads to false arrests

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## Citek Sleep Deprivation Study - 2011

### ■ 2 test sessions

- Full night's rest & awake for at least 24 hours

### ■ Presence & # of validated impairment cues up w/ BAC not w/ lack of sleep

- Sleep deprivation alone does not affect motor skills in a manner that would lead officers to conclude suspect is impaired

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## SFSTs

- Most incorrect arrest decisions actually let people over the limit go
- Minor variations in administration have no affect
- Mistakes benefit defendant
- Almost nothing the officer does will induce indicators of impairment

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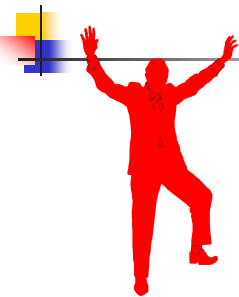
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## Defense Ploys

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## If Officer is Not Perfect, FSTs Should be Given no Weight

- Robustness study is on point
- Much more likely to err in def.'s benefit
- Did officer make it easier or tougher?
- Almost nothing officer does will induce signs of impairment

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### If Officer is not Perfect, FSTs Should be Given no Weight

- Validation only goes to numbers – argue demonstrated impairment
- Use breath/blood test – officer HGN was correct
- Totality of circumstances
- Common sense

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### Can't Give SFSTs if > 65 or Bad Knees/Back

- Original studies indicate may have difficulty doing W&T & OLS (manual mentions)
- Neither say do not give
- Field studies gave to ALL drivers
- Officers trained to take into account

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### Can't Give SFSTs if > 65 or bad knees/back

- Use juror's/judge's common sense
- Mental & physical tasks
- Where is subject having difficulty?
- Will not impact HGN
- Did suspect complain of physical ailments?

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### Can't Give SFSTs if > 50 lbs overweight

- Only applies to OLS
- Mental & physical tasks
- Where is person having difficulty?
- Will not impact HGN
- Did officer take into account?

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### Can't Give SFSTs if 2 inch heels or greater

- Original studies indicate may have difficulty doing W&T & OLS (manual mentions)
- REMEDY – allow to take shoes off
- Argue poor judgment & impairment
- Mental & physical tasks
- Where is the person having difficulty?
- Will not impact HGN

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### Must Have Real Line for W&T

- Manual says real or imaginary line (ARIDE designated straight line)
- Line impacts very small portion of the test
- Officer's training/experience
- Juror's common sense

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## HGN Common Ploys



- 47 different types of HGN
  - Not true – 47 types of nystagmus HGN is just one type
- 4 – 6 cues = .05 not .08
- Potential head injury
- Strobe lights, car's passing
- How determine angle of onset?
- It's "Voodoo"

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## HGN Common Ploys

- Can't see due to sway
- Contacts
- Poor eyesight – glasses
  
- Emphasize officer was correct!

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## HGN is the Most Reliable Field Sobriety Test

- Involuntary
- Coordination does not influence
- Tolerance does not influence
- Shoes & ground surface do not influence
- Highest validation
- Use this for common ploys




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## What if Defendant Claims Natural Nystagmus?

- Rule 15.4
- VERY small % of population has it




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## HGN Angle of Onset

- **Defense Ploy:**
  - Get DRE officer to use angle of onset formula to quantify BAC
  - Try to assert 4 cues =  $<.05$  BAC




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## HGN Angle of Onset

- Even DRE officer not allowed to quantify BAC using HGN
- Limited to above or below .08 testimony
- Corroborates blood test

*State v. Superior Court (Blake, RPI)*, 149 Ariz. 269 (1986); *State ex rel. McDougall v. Ricke*, 161 Ariz. 462 (App. 1989).

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## Final Reminder

- Do not get so focused on defense plays that you fail to bring out the totality of the circumstances.
- Poor driving, admissions, breath/blood tests other impairment all corroborate the FSTs.

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## Questions

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